Supreme Court, U.S.
FILED
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92-201

No. 92-

IN THE

Supreme Court of the United States

October Term, 1991

CONDADO PLAZA HOTEL & CASINO,

Petitioner,

against

ASOCIACION DE EMPLEADOS DE CASINO DE PUERTO RICO, CONCILIATION AND ARBITRATION BUREAU ARBITRATOR JUAN T. RODRIGUEZ,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PUERTO RICO

PETITION FOR CERTIORARI

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(8074—LC6-315—1992)

The Questions Presented

1. Whether the appropriate standard of review is the doctrine of deference to an Arbitrator's award when it fails to draw its essence from the collective bargaining agreement where a conflict of United States First versus Fifth and Fourteenth Amendment rights is the Crux of the Controversy and the Award must be rendered in conformity to law as a mutual condition reached by the parties to the finality of the award.

2. Whether a false, defamatory statement by an employee under the guise of an opinion is constitutionally protected speech if the forum is a Legislative Assembly when he intends and petitions for damages to the reputation and business of its employer.

3. Whether an employer can justifiably discharge a disloyal employee that causes real damages to the service, business or product of the employer under prevalent labor and case law.

List of Parties Under Rule 28.1

Condado Plaza Hotel & casino is a four star hotel owned by Posadas de Puerto Rico Associates, Inc., a public corporation organized under the laws of Delaware.

WMS, Inc., a Delaware public corporation, is one of the parent companies of Posadas, through a wholly owned subsidiary, Williams Hotel Corp., also a Delaware public corporation. The latter owns 92.5% interest in Posadas de Puerto Rico Associates, Inc. and also:

50% interest in Posadas de San Juan Associates, a partnership organized under New York limited partnership law doing business as El San Juan Hotel & Casino, through E.S.J. Hotel Corp., a wholly owned subsidiary of WMS, Inc.;

55% interest in a subsidiary Delaware public corporation, Williams Hospitality Management Corporation, that manages both properties, as well as Palmas del Mar Inn & Casino, and;

46.54% interest in WKA Elcon Associates that owns 50% of El Conquistador, LP, both partnerships recently organized under the laws of the state of New York, scheduled to commence operations in late 1992 or early 1993 as El Conquistador Hotel & Casino. KG Caribbean, Inc. owns the remaining 50% of El Conquistador, LP.

The remaining 7.5% interest in Posadas de Puerto Rico Associates, Inc. is held by the following parties:

5% by Hugh A. Andrews, President of Williams Hospitality,

2.5% by Burton I. Koffman, as Nominee of the Koffman family.

The Koffmans are private stockholders of Cenkoff, Inc., a New York corporation. They also hold:

40% interest in Posadas de San Juan Associates through a 25% interest in a private corporation, Midwest Property Corp.

which is a wholly owned subsidiary of K & C Holding Corp. and a 15% in Milt K. Associates, all organized under the laws of the State of New York,

38% interest in Williams Hospitality Management Corporation,

37.23% interest in WKA Elcon Associates that owns 50% of the Elcon, LP.

On his part, Hugh A. Andrews owns a 10% interest in Posadas de San Juan Associates through IHS Associates, Ltd. , a Delaware wholly owned corporation. In addition, he holds a 7% interest in Williams Hospitality Management Corporation; and a 16.23% in the WKA Elcon Associates that owns 50% of Elcon, LP.

The Bureau is a division of the Puerto Rico Department of Labor, a government agency. Juan T. Rodriguez is an Arbitrator and Assistant Director of the Bureau.

Asociacion de Empleados de casino is a Union representing Condado Plaza casino employees.

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No. 92-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991.

CONDADO PLAZA HOTEL & CASINO,

Petitioner,

v.

ASOCIACION DE EMPLEADOS DE CASINO DE PUERTO RICO CONCILIATION AND ARBITRATION BUREAU, and ARBITRATOR JUAN T. RODRIGUEZ,

Respondent.

ON CERTIORARI FROM THE SUPREME COURT OF PUERTO RICO

PETITION FOR CERTIORARI

Condado Plaza Hotel & Casino[1] the Petitioner, respectfully prays that a writ of certiorari be issued to review a final Ruling of the Supreme Court of Puerto Rico dated February 21, 1992 and entered on February 24, 1992 [App. (iii), p. 44] denying the rehearing of its January 17, 1992 Judgment [App. (i), p. 1] issued under Rule 50 of the Rules of the Supreme Court of Puerto Rico, 4 L.P.R.A. Ap. IA, Rule 50.

Opinion Below

The Puerto Rico Supreme Court Judgment at bar affirms a judgment issued in Case No. KAC 91-0543 by Superior Court Judge, Angel F. Rossy, on September 25, 1991 [App. (ii)A, p. 9] affirming the Award rendered in Case A-2270 [App. (ii)B, p. 19] on March 8, 1991 by Arbitrator Rodríguez on the merits of the dismissal that another Superior Court judgment enjoined him from entertaining in a companion case that is also object of a separate Petition for Certiorari before this Court. The Court below summarily affirmed the Superior Court Judgment and Award relying only on the Petition for Review filed under the authority of the cited Rule 50 of its Rules without addressing the substantial First, Fifth, and Fourteenth Amendment rights invoked under the United States Constitution.

[1]This is the trade name under which Posadas de Puerto Rico Associates, Inc., does lodging and entertainment business in Puerto Rico. From hereon Petitioner will be referred to as Condado Plaza.

The Puerto Rico Supreme Court Judgment is not officially reported.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1258, which provides that final decrees or judgments from the Supreme Court of Puerto Rico are reviewable by writ of certiorari, where the validity of a statute of the Commonwealth is drawn in question on the ground of its being repugnant to the United States Constitution and federal laws and the decision is in favor of its validity; or where a right or privilege is claimed under the U.S. Constitution and laws. *US Constitution, Art. III, Sec. 3.*

Review should be undertaken by this Supreme Court as the Supremacy Clause of the Constitution binds "the Judges in every state, . . . anything in the Constitution or Laws of any State to the contrary notwithstanding," to maintain the supreme law of the land within a single, uniform meaning which the judiciary is bound to respect and enforce. U.S. Constitution, Art. VI, cl 2; *Marbury v. Madison*, 1 Cranch 137 (1803); *Cohens v. Virginia*, 6 Wheat 264 (1821). Since *Balzac v. People of Porto Rico*, 258 U.S. 298 (1922), this Court held that the guaranties of certain fundamental rights declared in the Constitution, as are the deprivation of life, liberty or property without due process of law, had full application in Puerto Rico.[2] This Court has furthermore established that a uniform body of federal labor law is applicable to all states, which includes Puerto Rico. *Textile Workers Union v. Lincoln Mills*, 353 US 448 (1957).

The Time Factors Upon Which Jurisdiction Rests Were Met.

Finality, under 28 U.S.C. § 1258 arises when a decision precludes further adjudication in the Supreme Court of Puerto Rico.

The January 17, 1991 Judgment in Case CE 91-690 became final upon the denial of rehearing entered on February 24, 1992. This petition is being docketed within the enlargement of time granted by this Court upon an application timely filed within 90 days from the denial of rehearing of the Judgment below.

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[2]*Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 478 U.S. 328 (1986); *Examining Board v. Flores de Otero*, 426 U.S. 572 (1976); *Calero Toledo v. Pearson Yatch Leasing Co.*, 416 U.S. 663 (1974); *Fornaris v. Ridge Tool Co.*, 400 U.S. 41 (1970).

There Is A Justiciable Live Controversy Before This Court.

The issues at bar are likely to arise in cases where, like here, the Petitioner is engaged in interstate commerce and is unquestionably covered by the Labor Management Relations Act, 29 U. S. C. § 141 *et seq.*; or where substantial individual rights protected by the United States Constitution are in controversy. The issues are capable of repetition because the only free arbitration services provided in Puerto Rico are those provided by the Bureau, traditionally identified with the worker, in conflict with federal labor law that provides independent services.

Puerto Rico labor law, as argued further in the companion case Petition, conflicts with federal law because an employer in an industry engaged in interstate commerce in Puerto Rico has not been awarded the same standing and protection as the applicable federal law extends when substantial constitutional rights are violated. *Lincoln Mills, supra*. The "capable of repetition, yet evading review" doctrine is appropriate to issue review.[3] The underlying live question persists, *Carroll v. Princess Ann*, 393 US 175, 179 (1968).

No Adequate State Grounds Bar Review.

United States and Puerto Rico Constitution rights were the basis for the review petitioned below as well as the conflict between state and federal labor law, which is a federal question. The judgment at bar relying in the interpretation of a local statute that incorporated reference to expressions made by an employee in the Legislative Assembly as an exclusion of just cause for his dismissal AFTER this particular employee had been discharged when the then prevalent text of Act 80 of May 30, 1976, 29 LPRA §185b *et seq*. did not proscribe such a discharge is not an adequate non-federal ground to validly bar review because it departs from federal constitutional law. *United Air Lines v. Mahin*, 410 US 623, 630-31 (1973). Even when the state court fails to pass upon the federal claim, as it did, the lack of jurisdiction is not conclusive when substantial federal constitutional

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[3]*Storer v. Brown*, 415 US 724, 737 (1974) ; *Richmond Newspapers, Inc. v. Virginia*, 448 US 555 (1980); *Gannett Co., Inc. v. DePascuale*, 443 US 368 (1979); *Nebraska Press Ass'n v. Stuart*, 427 US 539 (1976); *Sosna v. Iowa*, 419 US 393 (1974); *Super Tire Engineering Co. v. McCorkle*, 416 US 115 (1974); *Rosario v. Rockefeller*, 410 US 752 (1973); *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 US 498 (1911).

rights are in controversy and a departure from the body of federal labor law is present. *Wood v. Chesborough*, 228 US 672, 676-80 (1913). If no adequate non-federal ground supports the state court judgment, the court has jurisdiction. *Klinger v. Missouri*, 13 Wall 257, 263 (1871). Otherwise, Supreme Court jurisdiction would be defeated by an inapplicable selection of some local ground for the decision.

We invoke this court's jurisdiction to review as a necessary means to declare and maintain uniform principles of constitutional law. *Martin v. Hunter's Lessee*, 1 Wheat 304 (1816). The citizens of Puerto Rico are United States citizens protected by the federal Constitution. The Commonwealth cannot under section 2 of Chapter 145 of the Organic Act of March 2, 1917 still effective under the Compact, 64 Stat. 319, deprive United States citizens of any fundamental right without passing the strict scrutiny of this Supreme Court. Such obligation arises under the Organic provision "as if Puerto Rico were a state of the Union and subject to the provisions of Art. VI(2)(1) of the Constitution". *Posadas, supra*.

Constitutional Provisions, Law and Rules

First Amendment, United States Constitution:

> "Congress shall make no law *** abridging the freedom of speech ***."

Fifth Amendment, United States Constitution:

> "No person shall be *** deprived of life, liberty, or property, without due process of law ***."

Fourteenth Amendment, United States Constitution:

> "Section 1. *** No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Act 80, of May 30, 1976: Unjust Dismissal Act, 29 LPRA §185b:

> "It will be understood to constitute just cause for the dismissal of an employee in a business:
>
> (a) That the worker follows an improper or disorderly pattern of conduct.
>
> (b) The attitude of the worker of not rendering his work efficiently, or of rendering it late and negligently or in

violation to the quality standards of the product produced or handled by the establishment.

(c) The repeated violation by the employee of the reasonable rules and regulations adopted for the functioning of the establishment provided that a written copy of the same be furnished opportunely to the worker.

* * *

"It will not be considered a discharge for just cause that which is made by pure caprice of the employer or for no reason related to the good and normal function of the establishment." (Our translation.)

Act 65 of July 3, 1986, 29 LPRA §185b, amending Act 80, supra:

"It will not be considered a discharge for just cause that which is made by pure caprice of the employer or for no reason related to the good and normal function of the establishment. *Nor will it be considered just cause for the discharge of an employee the cooperation or expressions made by him, related to the business of his employer, in an investigation before any administrative, judicial or legislative forum in Puerto Rico. In this last case, the employee so discharged will have the right, in addition to any other corresponding adjudication, that his immediate reinstatement to his job be ordered and that he be compensated for a sum equal to the salaries and benefits that he has not received from the date of his discharge until a tribunal orders his reinstatement to his employment.* (Our translation.)

Act No. 9, of October 3, 1986, 29 LPRA §185b, amending Act 80:

". . . . Nor will it be considered just cause for the discharge of an employee the cooperation or expressions made by him, related to the business of his employer, in an investigation before any administrative, judicial or legislative forum in Puerto Rico *when such statements are not of a defamatory character nor constitute the disclosure of privileged information according to law.* In this last case, the employee so discharged will have the right, in addition to any other corresponding adjudication, that his immediate reinstatement to his job be ordered and that he be compensated for a sum equal to the salaries and benefits that he has not received from the date of his discharge until *his reinstatement.* (Our translation.)

Collective Bargaining Agreement, Art. V. Complaints and Grievances:

"If there should arise any controversy, of any kind, between the Union and the Employer regarding the interpretation, application or administration of any term or terms of this Collective Bargaining Agreement, or regarding the disciplinary sanction of one or more employees, said matter must be resolved in a final and binding manner, pursuant to the following procedure:

First Step * * *
Second Step * * *
Third Step * * *

"Fourth Step. Within 30 days after the decision of the Casino Director, or after the time period that the Casino Director has to render his decision has expired, the Union may proceed to Arbitration. . . . .

"3. When an issue or controversy is referred to arbitration, the parties must try to submit a submission agreement to the arbitrator containing the question or questions to be resolved by the arbitrator. If the parties are unable to reach a submission agreement, the arbitrator, after hearing the proposals of both parties on the subject, shall then be able to formulate the question or questions to be resolved. Nothing in this clause shall be understood to be a limitation of the faculties that the arbitrator has or may have pursuant to the arbitration clause of this Collective Bargaining Agreement.

"4. The jurisdiction of the arbitrator shall be exclusively determined by the terms of this Collective Bargaining Agreement. The arbitrator shall not be empowered or authorized to extend his jurisdiction to cover issues not included in the Agreement, but he must decide any controversy related to compliance with the procedural steps required to bring the matter to arbitration."

"5. The arbitrator has no jurisdiction to alter, amend or modify the provisions of this Agreement, and any award which violates this provision shall be considered *null and void.* (emphasis supplied)

"6. The arbitrator's duties shall be adjudicative and not legislative, and he shall not have jurisdiction to consider or resolve any matter related to the negotiation of a new Agreement.

"7. The arbitrator shall also have jurisdiction to decide whether an employee has been dismissed or suspended without just cause; provided, however, that the arbitrator shall not have jurisdiction to consider and resolve any complaint regarding the suspension or discharge of a probationary employee. . . .

"8. The decision of the arbitrator shall be final and binding for the contracting parties as well as for all of the employees covered by this collective bargaining agreement *provided that it is in accordance with the law.* The determinations of fact shall be conclusive, *except for the question of procedural or substantive arbitrability, which shall be resolved in the first instance by the Arbitrator but may be subject to judicial review.*" (emphasis added)

"9. If any of the parties fails to appear before the Arbitrator after having been duly notified of the hearing, the arbitrator may issue his award based on the evidence submitted by the party that was present.

"17. Management shall also be entitled to use the arbitration procedure as a quick solution to any controversy involving the interpretation or application of this Collective Bargaining Agreement or the regulations governing its union personnel, notwithstanding the fact that the preceding paragraphs were drafted to process the grievance of the employees and/or the Union, pursuant to the same conditions stipulated by the parties.

Statement of the Case

A unitary statement of this case, and the companion case filed before this Court on the same date is appropriate for an orderly comprehensive presentation to this Court.

Condado Plaza and the Casino Employees Union, hereinafter referred to as the Union, negotiated and signed a collective bargaining agreement (CBA) that ended a 107-day labor dispute on February 22, 1985 for a three year term. During the labor strife, the Union's attorney and the then vice-president, Víctor Villalba, repeatedly made use of the press accusing both Mr. Hugh Andrews, President of Williams Hospitality Management Corporation, hereinafter referred to as Williams, and Williams: of monopolizing the games of chance in Puerto Rico; of influence-peddling in the Tourism Company and in the Legislature to increase the gaming betting limits; of violating the

prohibition to advertise casinos and eliminating the dress code of the gaming law; of controlling, and offering jobs to, the Tourism Gaming Directors to influence them in taking away power from the government inspectors and; of taking away vested benefits from its employees. The petitioner never answered the charges in the arena of the press, as proved to the Arbitrator.

Condado Plaza prevailed in its demands for productivity in exchange for the Union's financial demands. The Union accepted an increase in the workday from seven hours to 7:20 hours; the exclusion of the meal period from the definition of "workday" that had been paid as time worked; and a change in the scheduling of active shifts at the table. Before, a croupier worked one hour at the gaming table and would rest half an hour, which within a 7 hour work day, that included the meal half-hour period, yielded only five hours of productive time. Condado Plaza negotiated the shifts observed in other jurisdictions of one hour active work at the table, and a 20 minute rest. These changes allowed Management a yield of six productive work-hours, which allowed them to open more tables with the same employees. Although the Union at the table feared the loss of employment if they granted this demand; once the contract was signed, more employees were hired since many of the replacements used during the labor dispute were hired in addition to the regular work force. Since Condado Plaza is a union shop, Villalba had to know that there had been an increase in jobs, since union members and dues increased as a result.

On February 28, 1985—one week after the CBA was signed—the Legislature of Puerto Rico approved Joint Resolution 102 to study the tourist industry, picking up Villalba's continuous charges of monopolistic tendencies. On November 27, 1985 public hearings were held. Both Villalba and Andrews were summoned to appear before the Senate. Villalba, a Condado Plaza croupier, requested leave with pay from the Director of Human Resources to testify about the development of tourism, and was granted leave. Instead, in the presence of Andrews, at the Legislature Villalba addressed his entire report, reproduced in the Award [App. (ii)B, p. 19] and question-answer period to defame his employer.

Andrews believed that Villalba abused his constitutional right to freedom of speech—taking advantage of the influential public forum—when publicly charging the commission of several crimes,

providing false data knowingly in at least 13 items[4] and attacking the concessions that he freely bargained away in exchange for other benefits he had been granted at the bargaining table; thus eroding industrial peace and disrupting his business; and that to give his points of view on the development of tourism, he did not have to launch an attack against Williams libeling and humiliating him in front of the press and attending audience. This second round of accusations was not sparked by a heated labor dispute. Yet, he did not take action against Villalba until a major, tangible damage resulted as a direct consequence of his employee's malicious accusations. On November 29, 1985, the Department of the Treasury withheld the casino license that on November 26 it had approved for the El San Juan Hotel, a sister operation of Condado Plaza to be managed by Williams and scheduled to commence business on December 10, 1985, until a monopoly investigation on Williams was conducted by the Departments of Justice and Treasury.[5] On November 30, 1985, Andrews privately dismissed Villalba for malicious libel and defamation to Williams' reputation, for disloyalty, and interference with the sound operations of its business under the just cause provisions of Act 80 of May 30, 1976, 29 LPRA §185(b), as then effective.

On December 6, 1985, Villalba gave a press conference making the same libelous accusations as evidenced by the videos of two TV channels submitted to the Arbitrator. The petitioner never made comments to the press nor appeared on Television, as proved at Arbitration. On that same day, the Treasury Department had reconsidered the denial of the license and issued a provisional one conditioned to the result of the monopoly investigation without a right to appeal, as per the letter submitted to the Arbitrator.

[4]Extensive documentary and testimonial evidence, charts, statistics, tables, graphs, financial reports, lists, etc. was submitted to the Arbitrator showing that Villalba knew in fact that his accusations were totally false; and still recklessly made them.

[5]This direct damage was proved to the Arbitrator through the testimony of the Deputy Secretary of the Treasury, Manuel Sarmiento, at the Arbitration Hearing; and yet the Court below in its Judgment concluded that Condado Plaza could not prove its case on appeal but had to prove it at the arbitration level: where it did prove it.

Villalba sought arbitration of his grievance. On January 13, 1986 a triad of arbitrators was submitted to the parties by the Bureau. The parties selected Arbitrator Juan T. Rodríguez in February 1986. On that date Villalba's brother was working in the Bureau as Arbitrator, a serious concern that Condado Plaza trusted could be resolved when raising the lack of substantive jurisdiction as a defense at the corresponding hearing before Arbitrator Rodríguez.[6]

On January 30, 1986 . . . and on April 8, 1986 Villalba appeared before the House of Representatives repeating the false charges against his Employer. The official records of the November 27, 1985, January 30 and April 8, 1986 legislative transcripts were submitted to Arbitrator Rodríguez. As a result of his statements:

a. Williams was denied the license for operating the casino at El San Juan, then was issued a conditional license during one whole year.

b. Williams was subjected to further legislative investigations that resulted in several bills to impose taxes on all concessionaires that controlled more than 50% of the gambling, and to limit the number of licenses authorized to them.[7]

c. The Legislature adopted several bills to criminally penalize the employer, which did not become law but caused concern, anguish and uncertainty to the owners and stockholders and took time and cost money to defeat.

d. The permanent financing of the Hotel San Juan was delayed for two years when the Treasury conditioned the casino license to the investigation of monopoly, because the investors did not want to risk their money if the hotel did not have a casino to make the operation financially feasible.

These real mediate and immediate damages caused by Villalba to his employer are evident in detail in the extensive record, and which substantial evidence, the arbitrator evaded in his award; and the Court erroneously ignored in the invalid judgment at bar.[8]

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[6]*United Steelworkers v. Warrior & Gulf Navigation*, 363 US 585 (1961) *et al.*; *Enterprise Wheel, infra.*

[7]All three bills adopted as a by-product of Villalba's speech, as well as the position statements that Williams had to address to the President of the Senate and the Governor of Puerto Rico were submitted to Arbitrator Rodríguez.

[8]The Court below relied as grounds for affirming the Judgment on an amendment to Act 80, *supra*, that was adopted AFTER the discharge to prospectively prohibit the dismissal of an employee for statements in the Legislature.

On March 3, 1986 House Bill 712 was introduced amending Act 80, *supra*, to provide that the statements that an employee makes before any administrative or legislative forum against his employer will not be just cause for dismissal. Condado Plaza did not find out about the bill immediately since it was not invited to depose.

On April 3, 1986 the Arbitrator set the first hearing of the case for May 13, 1986. But, on April 4, and 8, 1986 the Secretary of Labor, officially appeared at the public hearings held, endorsed HB 712, and recommended that instead of the remedy of severance pay prevalent in Act 80; for that particular cause of dismissal, the reinstatement of the employee with back pay be adopted. It was requested to be heard on a subsequent date at the Legislature; but was never afforded the opportunity. When Condado Plaza learned about the Secretary's appearance and opinion, it requested on April 24, 1986 and was granted a continuance of the hearing to June 2, 1986. On May 22, 1986, the Legislative Assembly hastily approved HB 712. On that same date, since the opinion of the Secretary censuring the actions taken by the employer and *sub judice* in his Department could become law, in an effort to abide by its contractual obligations yet get a fair trial, Condado Plaza sent a letter to Villalba setting forth the basis for disqualification of the Bureau and requesting that the government arbitrator be substituted by a private arbitrator mutually chosen in accordance with the alternate method of resolving controversies contained in Article V §10 of the CBA.

On May 28, 1986 Villalba rejected the alternate method on the grounds that the government service was free of charge, and because there was no reason to recuse the Bureau. Since the reply was not received until June 6, 1986, on May 30, 1986 a Petition for Declaratory Judgment was filed in District Court for the First District, Case No. 86-0848, under section 301 of the National Labor Relations Act, 29 USCA § 185, in which the federal questions were raised anticipating that Condado Plaza would be deprived of its constitutional right to due process since the Secretary of Labor had publicly prejudged the issue *sub judice* before its Bureau. [App. (v)D, p. 140]

On June 2, 1986, at the beginning of the arbitration hearing, Condado Plaza timely raised before the Arbitrator the issues of disqualification of the entire Bureau and of substantive arbitrability. The conflict of having the Bureau report to the Secretary of Labor under the local labor statute when Condado Plaza is engaged in

interstate commerce and subject to the National Labor Relations Act, 29 USC § 172, that extracted such services from the US Department of Labor to protect impartiality and assigned it directly to the President of the United States was raised as part of the federal question posed and due process constitutional right. On the same date, the conflict with precedents from this Supreme Court on the question of substantive arbitrability was also raised. We have appended partial references of the official arbitration record to prove that the federal questions and the First v. Fifth and Fourteenth Amendment rights issues were duly raised. [App.(v)C, pp. 109-139]

This hearing was continued since the Arbitrator improperly delegated to the Director of the Bureau the ruling on the issues raised. On August 1, 1986, the Director decided that the motion for disqualification and substantive arbitrability was untimely raised since by selecting an arbitrator Condado Plaza had already submitted to its jurisdiction. The case was then rescheduled for September 26, 1986.

On September 8, 1986 Condado Plaza moved the District Court to stay the arbitration proceedings in aid of jurisdiction. On September 17, 1986 the Motion was denied. [App.(v)E, p. 149]

On September 26, 1986 Condado Plaza again raised the federal and constitutional questions to the Arbitrator, who is really the adjudicator that the parties vest with jurisdiction through a submission agreement and a CBA. [App. (v)C, p. 109] It tried in vain to have the Arbitrator first resolve whether he had jurisdiction or not under the agreement, allowing judicial review of the substantive arbitrability and disqualification issues, before hearing the merits of the dismissal, in accordance with the text of the agreement. The Arbitrator denied its motion forcing the merits of the dismissal or else he would continue the hearing *ex parte*. No jurisdiction was conceded to the Arbitrator in the submission agreement to resolve the merits of the dismissal limiting his purview to the determination of substantive arbitrability, that in the first instance he was supposed to resolve since the question of disqualification had been decided against Condado Plaza. But the Arbitrator adopted the proposal of the union that included both controversies, even though his jurisdiction was being challenged and the contractual right to judicial review properly raised.

On October 24, 1986 we filed a second motion in District Court to stay the hearing on the merits of the dismissal. It was denied. [App. (v)F, p. 153][9]

The record of 17 hearings over the jurisdictional and disqualification aspects shows that Condado Plaza never waived its rights BUT HAD NO ALTERNATIVE THAN TO PARTICIPATE TO RESPONSIBLY DEFEND ITS RIGHTS WITHOUT THE RISK OF HAVING AN ABANDONMENT OF THE COURT ROOM HELD AGAINST IT. Upon their conclusion and before entering the merits of the dismissal, Condado Plaza again raised the constitutional rights conflict. Sixteen hearings on the dismissal for just cause were held. On December 19, 1989 Villalba took the stand. (TR 9-137) He did not even try to prove that his statements were true nor produced any evidence to contradict the documentary and testimonial factual evidence introduced by the Employer including the extensive proof on damages that the Arbitrator chose never to mention in his award. At the time, Villalba worked for the Union earning only $230 less than as a croupier.

On May 25, 1990 briefs on the substantive arbitrability and disqualification issues were simultaneously submitted; and, on July 31, 1990 briefs on the merits of the dismissal were filed. Condado Plaza submitted summaries of the evidence that were not objected to by Respondents. In the arbitration briefs the questions were argued at great length.[10] Both awards were issued and notified on the same date although the numbers given to them were A-1036 and A-2270 instead of consecutive, which suggests that the arbitrability award, although issued before, was held back until the second award was written to defeat judicial review.

Condado Plaza never stood a chance in arbitration. Therefore, on April 8, 1991 we filed two petitions for review in the Superior Court that were assigned to two different court rooms in spite of our request

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[9]Standard *Drywall v. Painter*, 111 LRRM 2723 (1982). The Supreme Court of the United States stated in *W. R. Grace & Co. v. Local Union 759, Int'l Union of URCL & PWA*, 51 LW 4643 (1983), that:

> "The employer could have taken the initiative of seeking declaratory and injunctive relief prior to the commencement of arbitration."

[10]Due to the length of the Briefs and Summary of the Evidence filed at the arbitration stage, we shall reserve the translation and enclosure of those two documents for the Appendix should the writ be issued by this Court.

that both of them be assigned to the first court because the two controversies were interrelated. The questions were again raised at the state superior court level in the respective petitions for review of the two awards. [App. (v)B, p. 80][11] On August 21, 1991 the Honorable Judge Wilfredo Alicea issued a judgment in the first case providing:

> "Consistent with the prior exposition, the Court issued the following judgment:
>
> "a. It is decreed that the Arbitrator, Juan T. Rodríguez as well as the Conciliation and Arbitration Bureau of the Department of Labor and Human Resources, *must abstain from deciding the complaint on its merits, except for any stipulation to the contrary by the parties.*
>
> "b. The writ for review is denied as to the remaining assertions of errors, leaving the arbitration award in force."

On September 10, 1991 we timely raised a copy of the Judgment to the Superior Court Judge Angel F. Rossy, informing him that the award before him on the discharge—issued by the Arbitrator in transgression to the abstention ordered—was invalid *ab initio*. Inasmuch as he had not decided and the term to request the review of the Judgment of Judge Alicea was close to expire, we filed our writ for review in Case Number CE-91-616 in the court below on September 25, 1991. On that same day, Judge Rossy sustained the validity of the dismissal award, without any acknowledgement of the Judgment enjoining the Bureau and Arbitrator Rodríguez from intervening in the dismissal. A petition for review was filed in Case CE-91-690 before the Puerto Rico Supreme Court.

The First versus Fifth and Fourteenth constitutional issues and the federal labor law questions were raised on review before the Supreme Court as evidenced in the Petitions for Review. [App. (v)A, p.47]

The Questions are Substantial

The first phase of this case posed in the companion case is about the basic foundation of our system of constitutional law that every individual deserves a fair and impartial trial as a minimum requirement of the due process of law guaranteed by the Constitution of the United States. *Marshall v. Jerrico*, 446 U.S. 238 (1979), *In Re Murchison*, 349 U.S. 113, 116 (1954).

[11]The second petition is included in the Appendix of the companion case.

As this Court long ago established in *Offutt v. United States*, 348 U.S. 11 (1954): "Justice must satisfy the appearance of justice."

The second phase of this case poses the proper standard for the review of arbitration awards when substantial constitutional rights have been properly raised in all stages of the proceedings and the CBA from which the Arbitrator's draws its jurisdiction contains a qualified choice of arbitration as a means to resolve the parties contract dispute and not an absolute waiver of the courts in favor of arbitration.

The core question is whether a false, libelous, ill-willed opinion given by an employee in the legislative forum is so protected by the First Amendment free speech constitutional guarantee that an employer that has been directly deprived of his Fifth Amendment constitutional right to the property, use and enjoyment of its tangible (business) and intangible property (good name and reputation), proven actual mediate and immediate damages in the Arbitration hearing, cannot justly discharge him for disloyalty, improper conduct and disruption of its business, short of his right to recover damages civilly. *Milkovich v. Lorain Journal Co.*, 58 LW 4846 (1990).

(I)

When an Arbitrator's Award Fails to Draw its Essence From The CBA The Appropriate Standard of Review is Not Limited, But Independent, Review Especially Where a Conflict of Constitutional Rights is the Crux of the Issue and the Award Must Be Rendered in Conformity to Law as a Mutual Condition to Its Finality.

The judicial restraint accorded to awards when the dispute arises out of the collective bargaining process is not applicable to jurisdictional issues or cases where the award fails to draw its essence from the CBA demonstrating an Arbitrator's infidelity to his obligation. *W.R. Grace & Co.*, 461 US 757 (1982); *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 US 351, 357 (1971); *Enterprise Wheel & Car Corp.*, 363 US 593 (1960); *Gulf & Warrior Navigation Co.*, 363 US 574 (1960); *McGuinney v. Missouri-Kansas-Texas R. Co.*, 357 US 265, 268-270 (1958); *Lincoln Mills, A.T.& T., supra.*

The First Circuit Court of Appeals, under which Puerto Rico falls, has adopted a two-prong test to vacate an award. *Hoteles Condado*

Beach, La Concha and Convention Center v. Union de Tronquistas de Puerto Rico, Local 901, 763 F.2d 34 (CA 1, 1985); *Bettencourt v. Boston Edison*, 560 F.2d 1045 (CAI, 1977):

1. When the award is unfounded in reason or fact, and so unconnected with the wording and purpose of the contract as to manifest an infidelity to the obligation of the arbitrator.
2. When the award is outside the CBA itself because it is based on reasoning so palpably faulty that no judge could ever conceivably have made such a ruling.

There exist cases where the conduct or result of an arbitration proceeding is so distant from the mutual expectations embodied in the CBA or so alien to the impartiality and fairness envisioned in an arbitration proceeding as a whole, that an award resulting from said proceeding must be set aside since it is unfaithful to the obligation of the arbitrator. Thus, an award will be disregarded by a court on a showing of "fraud or bad faith or demonstrated bias or collusion." *Early v. Eastern Transfer*, 699 F.2d 552 (CA 1, 1983). In our case, the parties substituted the Arbitrator by the courts *only* on the condition that his award would be in accordance with the law. It WAS NOT an absolute waiver of the courts in favor of arbitration. We DID NOT give carte blanche to the Arbitrator. Our CBA clearly tells him that if his award DOES NOT CONFORM TO LAW, it is not final; but subject to judicial review.

The courts below knew that this case was sequel to the one in which serious germane issues had been raised to another Courtroom regarding arbitrability, disqualification, violation of constitutional rights. The Court was timely informed that another Judge had ordered, in the case from which the one that was under his consideration stemmed, the disqualification of the Bureau and of the Arbitrator. Yet, it deferred to arbitration on the merits.

The Court below should have determined whether the asserted errors were founded before deferring to the controverted award since the general doctrine is not applicable in the case of the record. Yet, it failed to apply the standard of review that it had adopted since 1949, *J.R.T. v. N.Y. and P.R. S/S Co.*, 69 P.R.R. 782 (1949): that when the CBA, the submission agreement, or a statute provides that the Arbitrator should render his award pursuant to the law, he is bound to follow the law and must issue his awards in accordance with the prevailing legal doctrines; or else the award is subject to full judicial

review. If there was any doubt about extending independent review as an exception, the court below clarified it in *Sonic Knitting Industries v. I.L.G.W.U.*, 6 TPR 783 (1977); *UIL de Ponce v. Destileria Serrallés*, 116 DPR 348 (1985).* The clear doctrine in Puerto Rico is that the function of an Arbitrator that is required by the parties to decide in accordance with law is one analogous to that practiced by a sentencing lower court [of first instance in the civil court system], whereby the appellate forum can independently review the issues and judge the correctness and validity of the award apart from the limited review recognized under the traditional causes for setting aside an award.

In view of the substantial questions raised in this writ, this Court should review if the Judgment at bar is in accordance with the federal law applicable in Puerto Rico to industries engaged in interstate commerce in the labor field, *Lincoln Mills, supra;* and whether the award affirmed by said Judgment drew its essence from the CBA, *W.R. Grace, supra,* when its conclusions of law are not in line with this Court precedents on First Amendment abuse of free speech that affect the honor, reputation, property and business of a private person as argued under the fifth question raised herein.

The Determinations of Fact are not Substantiated by the Totality of the Record Whereby it Constitutes an Error of Law.

The Arbitrator's and Court's findings of fact on the issues of arbitrability, disqualification, and constitutional rights are not supported by the ample, clear evidence on the record as a whole. This error of reliance on "non-facts" becomes a reviewable error of law. *Universal Camera Corp. v. NLRB*, 340 US 474 (1951). Due to page limitations we cannot exhaust here this argument. Suffice it to point out that the Arbitrator erroneously omitted in his award any reference to the proven damages in arbitration that Villalba's statements caused his employer. This led the Court to mistakenly conclude in its Judgment [App. (i)A, p. 1]

> ". . . . Assuming that the conduct of the appellee has constituted an infraction, in the case at bar it was not shown before the arbitrator that Mr. Villalba's testimony negatively affected the appellant's business. *Such a showing* cannot be *done in the* process of legal review. . . ."

This erroneous conclusion is based on a non-fact. Several hearings were devoted to prove damages, including testimony of the Deputy Secretary of the Treasury that denied the license.[12] To move this Court's discretion we list some grounds to prove this error:

— the public humiliation to Andrews when hearing the false charges against his company, not thinking then about disciplining the employee who gratuitously defamed him but rather on how to repair the damage caused. [Hearings of October 20, 1987, TR 102-4, 107; January 22, 1988, TR 9, 14-15]

— the immediate denial of the casino license on November 29, 1985 to El San Juan Hotel scheduled to open four days later specifically on the basis of Villalba's statements. [Hearings of January 22, 1988, TR 16-17, June 28, 1988, TR 23 et seq.; September 8, 1989, TR 3-31 (Manuel Sarmiento's testimony); September 9, 1988, TR 72 et seq. Exhibit 42, Letter of December 6, 1985 from the Treasury Department]

— Two-year delay to obtain permanent financing for the El San Juan Hotel as no PR, US or European bank wanted to assume the risk of financing $30 million without the certainty of a casino license. The provisional nature of the license did not afford sufficient guarantees. [Hearing of December 1, 1987 (complete); January 22, 1988 (complete); September 27, 1988, TR 16-18; 26-27; 87-89, 93-94, October 7, 1988, TR 59-60]

— Operating financial difficulties as a result of the delay in the permanent financing. [January 22, 1988 Hearing, TR 18]

— Loss of other managing contracts for Williams since other investors feared government refusal of a casino license to Williams due to Villalba's monopoly charge, limiting Williams expansion with specific examples and identification of the interested companies. [January 22, 1988, TR 20-21, 26-28]

— The monopoly charge caused the Legislature to order an investigation of Williams and submitted three bills. [Exhibits 1, 2, 4, 29] One of them provided that no company could control more than 50% of the market, levying a tax on any excess above 50%, with the concomitant loss in time and money in meetings

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[12]We are in a position to prove—with reference to the page in the official transcript—every damage alleged in the Statement of the Case.

with legislative and executive branches, including the Governor. [October 7, 1988 Hearing, TR 30, 40-42, 60-61]

Evidence in the record dramatizes the palpably faulty reasoning based on non-facts that produced a decision that no judge would have reached. In view of the page limitations for the time we refer this court to App. (v)G, p. 156 where examples of evidence in the record regarding the falsity of the statements made, and the fact that Villalba knew that they were false, were given to the court below in our Motion of Rehearing when they issued the Judgment under Rule 50. The Arbitrator concentrated his award on the libel of charging violation of the anti-monopoly law in spite of the fact that two other felonies were charged, which constitute libel *per se*. He ruled that he could not find that Villalba had charged a violation to the gaming law, which is a penal statute, when there are at least two documents with Villalba's own signature, two official legislative transcripts, newspaper articles, and videos from Channel 2 and 4 that we presented to support such a finding.

All of the hearings were officially transcribed. The documental evidence was substantial. The Court is in the same position to weigh the testimonial evidence because there is no controversy over the credibility of the witnesses; nor over the facts that gave rise to the dismissal. And, the case revolves around an interpretation of the law that this Court is in the best position to settle.

By granting review, this Court will afford Condado Plaza its right to due process denied by the Courts below when they deferred to an award that did not draw its essence from the CBA as it did not conform to the condition imposed by the parties that it must be in accordance with the law, issued over a court injunctive order.

(II)

A False, Defamatory Statement By an Employee Under the Guise Of an Opinion Is Not Constitutionally Protected Speech Simply Because the Forum is a Legislative Assembly When He Intends, and Petitions for, Damages To the Reputation and Business Of His Employer.

The Court below erred in confirming an award contrary to Law that involves a substantial controversy of constitutional law. The Constitution does not protect under the guarantee of freedom of speech any ill-intended opinion based on facts known to be false by

the defamer, or negligently uncorroborated, that damage the reputation and property of a person protected by the Puerto Rico Constitution and under the common law rights recognized by this Supreme Court in the interpretation of the First Amendment rights under the United States Constitution. *Milkovich, supra,* firmly established that the constitutional privilege does not extend to an "opinion" as part of the guarantees of the First amendment—contrary to the protection extended to Villalba's "opinion" by the Arbitrator and the lower courts. The Award and Judgment at bar granted protection to proven false statements— under the guise of an opinion— that DID cause damages to the employer of the worker who publicly defamed him simply because the "opinion" was given in the legislative forum. But, in *McDonald v. Smith,* 105 S. Ct. 2787 (1985), this Court already decided that:[13]

> "There is no sound basis for granting greater constitutional protection to petitioning than to other First Amendment expressions."

Furthermore, in *U.S. v. Grace,* 51 LW 4444 (1983), quoting *Adderly v. Florida,* 385 U.S. 39 (1966), this Court established that the right to freedom of speech is not unlimited:

> "We have regularly rejected the assertion that people who wish to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please."

These precedents are applicable to our case and do not conflict with the Commonwealth's Supreme Court prior case law on the field. The right to freedom of speech was consecrated in Article II, § 4 of the Puerto Rico Constitution. The right to honor and reputation was elevated to constitutional rank in 1952, Article II, §8. The equilibrium of these rights is maintained unharmed *provided that good use is made* of the right of freedom of speech and it is *not abused. Pueblo v. Pacheco Padró,* 58 PPR 739 (1941). On the other hand, false statements in the Legislature have not received greater protection than other false statements in Puerto Rico. In *Pueblo v. Pérez Casillas,* 17 TPR 466 (1986), facing a perjury charge from statements made in the Legislature during the investigative hearings related with the events of the murders at Cerro Maravilla by the Police, the court below held:

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[13]See: *D. & B. v. Greenmoss Builders, Inc.,* 53 LW 4866, (1985); *Connick v. Myers,* 461 U.S. 146 (1982); *California Motor Transport v. Trucking Unlimited,* 404 U.S. 508 (1972); 50 Am Jur 2d. pp. 705, 734.

> Thus, under Penal Code, Art. 225, perjury is committed when a person testifies before a legislative committee as to the truth of a material fact, knowing it to be false.
>
> "The protection does not extend to perjured testimony. *U.S. Applebaum*, 445 U.S. 115 (1980)." [at 448]

The Arbitrator never even considered the fact that Villalba committed perjury, a felony, because he never weighed in his award the issue of the falsity of the statements, dwelling only on the fact as to whether they were libelous. But, if the statements were not true, and caused damage they are defamatory. Three of them charged that Condado Plaza committed crimes punishable by law. The charging of a crime is libel *per se*. The Arbitrator had to pass judgment on the veracity of falseness of the statements. We rest on *Garrison v. Louisiana*, 379 U.S. 64 (1964); *Chaplinsky v. New Hampshire*, 315 U.S. 568; *Herbert v. Lando*, 441 U.S. 153 (1979); 50 Am Jur 2d, §455. In order that the defense of the truth may prosper in a libel case, the defamer has to show not only that the fact is true but also that the publication was made with good intentions and for justifiable purposes. *Beauharnais v. Illinois*, 343 U.S. 250 (1952). The Arbitrator had no exculpatory evidence before him. He evaded the weight of this finding by concluding that he could not locate said statements in the record. We can prove otherwise with specific reference to the exhibits and transcript page reference if this Court accepts review.

The Court Commits an Error When It Confirmed an Award That Determines That Williams And Andrews Are Subject To the Test Of Malice For A Public Figure.

The individual right to a reputation overrides the abuse of freedom of speech—even when the press is involved—except when the criticism or defamation is directed towards public officials, in which case another trend covers it stemming from the interest of the citizenry in monitoring officials who must be accountable to public processes, as discussed further on. The ruling case on libel is *New York Times Co. v. Sullivan*, 376 U.S. 254 (1963). The doctrine was further elaborated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1973); and in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976). In the latter this Court stated:

> "The standard enunciated in *New York Times Co. v. Sullivan*, 376 U.S. 254, as later extended, which bars media liability for

defamation of a public figure absent proof that the defamatory statements were published with knowledge of their falsity or in reckless disregard of the truth, is inapplicable to the facts of this case.

"a. Respondent was not a 'public figure' since she did not occupy a role of special prominence in the affairs of society" and had not been 'thrust . . . to the forefront of the particular public controversies in order to influence the resolution of the issues involved. Gertz * * *

As to what constitutes a public controversy, the Court said:

"But in doing so, petitioner seeks to equate 'public controversy' with all controversies of interest to the public. Were we to accept this reasoning, we would reinstate the doctrine advanced in the plurality opinion in *Rosenbloom v. Metromedia, Inc.*, 403 US 29 (1971), which concluded that the New York Times privilege should be extended to falsehoods defamatory of private persons whenever the statements concern matters of general or public interest. In Gertz, however, the court repudiated this position, stating that "extension of the New York Times test proposed by the Rosenbloom plurality would abridge a legitimate state interest to a degree that we find unacceptable." 418 U.S. at 346. "Petitioner would have us extend the reasoning of *Cox Broadcasting* to safeguard even inaccurate and false statements, at least where "actual malice" has not been established. But its argument proves too much. It may be that all reports of judicial proceedings contain some informational value implicating the First Amendment, but recognizing this is little different from labeling all judicial proceedings matters of 'public or general interest' . . . Presumptively, erecting the New York Times barrier against all plaintiffs seeking to recover for injuries from defamatory falsehoods published in what are alleged to be reports of judicial proceedings would effect substantial depreciation of the individual's interest in protection from such harm, without any convincing assurance that such a sacrifice is required under the First Amendment. And in some instances, such an undiscriminating approach might achieve results directly at odds with the constitutional balance intended . . . our decision in that case should make it clear that no such blanket privilege for reports of judicial proceedings is to be found in the

> constitution . . . As to inaccurate and defamatory reports of facts, *matters deserving no First Amendment protection*, see 418 U.S. at 340. We think Gertz provides an adequate safeguard for the constitutionally protected interest of the press and affords it a tolerable margin for error by requiring some type of fault."

Philadelphia Newspapers, Inc. v. Hepps, 54 LW 4375 (1986), also deals with the balance between the rights to freedom of speech and reputation. Expanding on Gertz, Justice O'Connor reasoned:

> "One can discern in these decisions two forces that may reshape the common law landscape to conform to the First Amendment. The first is whether the plaintiff is a public official or figure, or is instead a private figure. The second is whether the speech at issue is of public concern. When the speech is of public concern and the plaintiff is a public official or a public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised by common law. When the speech is of public concern but the plaintiff is a private figure, as in Gertz, the constitution still supplants the standards of the common law, but the constitutional requirements are, in at least some other range, less forbidding than when the plaintiff is a public figure and the speech is of public concern. When the speech is of exclusively private concern and the plaintiff is a private figure, as in *Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 US 4866 (1985), the constitutional requirements do not necessarily force any change in at least some of the features of the common law landscape."

Although neither Williams nor Andrews are public figures, evidence on the falsity of the statements was painstakingly introduced. Villalba did not undertake to prove their truth. We rest on *Waldbaum v. Greenbelt Consumer Service, Inc.*, 627 F. 2d 1287 (1980) as a persuasive lower court opinion on public figures:

> "From analyzing Gertz and more recent defamation cases, we believe that a person can be a general public figure only if he is a "celebrity"—his name a "household word"—whose ideas and actions the public in fact follows with great interest. We also conclude that a person has become a public figure for limited purposes if he is attempting to have, or realistically can be expected to have, a major impact on the resolution of a specific

> public dispute that has foreseeable and substantial ramifications for persons beyond its immediate participants. In undertaking this examination, a court must look through the eyes of a reasonable person at the facts taken as a whole.
>
> "With this background, we turn to the standards themselves for determining when a person is a public figure. A court first must ask whether the plaintiff is a public figure for all purposes. Gertz, as noted above, held that a plaintiff would be found to be a general public figure only after a clear showing of "general fame or notoriety in the community and pervasive involvement in the affairs of society. . ." He must have assumed 'a role of especial prominence in the affairs of society. . .' *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Accord, Wolston v. Reader's Digest Association*, 443 U.S. 157 (1979). In other words, a general public figure is a well known celebrity, his name a 'household word.' The public recognizes him and follows his words and deeds, either because it regards his ideas, conduct, or judgment as worthy of its attention or because be (*sic*) actively pursues that consideration.
>
> "Few people, of course, attain the general notoriety that would make them public figures for all purposes."

The record shows that if Andrews, received a publicity highlight in the press, it was not promoted by him. It was Villalba, who made constant statements in the press and held several press conferences that were televised. Andrews never answered. If anyone jumped into the public arena, it was Villalba. The notoriety created by him cannot turn a person that never went before the press, TV or any publicity media into a public figure as incorrectly held by the Arbitrator and affirmed by the Court.

A corporation can be slandered. It is recognized as a person. It can sue for libel with respect to its business, credit, stockholders, and officers when it suffers damages. Likewise, it can recover for defamation that affects its financial position, credit, prestige, its methods of business; or when it is accused of fraud, a crime, or bad management.[14] Dealing with criticisms of commercial conduct, the

[14]33 Am. Jur. §193, p. 183; 50 Am. Jur. 2d 497, *Libel and Slander*, pp. 497-781; *Herbert v. Lando*, 441 U.S. 153 (1979); *Owens v. Scott Publishing Co.*, 84 P. 2d 296 cert. den. 350 U.S. 968 (1955); *Meyerson v. Huribut*, 98 F. 2d 232, cert. den. 305 U.S. 610 (1938); *Coop. de Serguros Multiples de P.R. v. San Juan*, 294 F. Supp. 627 (1968).

protection is clearer. In *Vegod Corp. v. American Broadcasting Companies, Inc.*, 603 P. 2d 14 (1980), in which a company that worked at closing businesses was defamed, the Court said:

> "Criticism of commercial conduct does not deserve the special protection of the actual malice test, balancing one individual's limited First Amendment interest against another's reputation interest. We conclude that a person in the business world advertising his wares does not necessarily become part of an existing public controversy. It follows that those assuming the role of business practice critics do not acquire the First Amendment privilege to denigrate such entrepreneur."

Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F. 2d 583 (CA 1, 1980), had to do with a corporation that built quality boats and had an excellent reputation until the quality of their boats was questioned in an article, and it sued for libel. Quoting one of the most outstanding authors in constitutional law, L. Tribe, American Constitutional Law, pg. 645 (1978), the Court of Appeals stated:

> "A fairly high threshold of public activity is evidently necessary for a finding that a person has voluntarily plunged into a public controversy."
>
> "We recognize the attraction of broad and clear-cut definitions in terms of simplifying litigation, but we cannot see how corporations as a class can be said to be 'public figures' for First Amendment purposes. . ."

Andrews is hardly a "household word." Neither is Williams, a corporation that never thrusted itself into the public arena and who was the most adversely affected "person". Not only the name and product of the corporation was questioned but its property interests immediately and mediately affected by the employee. If a libeled person, be it natural or juridical, has the recognized right to recover from the defamer actual damages in a libel suit, how could it be unjust to dismiss that defamer before he continued to disrupt his business? *Connick v. Myers*, 461 U.S. 146, (1982).

The conclusion of law that Andrews and Williams were public figures that had to meet the malice test is ground for revoking the Judgment and Resolution below. . .and setting aside the Awards.

(III)

Under Prevalent Labor Law, An Employer Can Discharge A Disloyal Employee That Causes Damages to His Service, Product or Business.

A Judgment that confirms an award that holds that the federal labor doctrine woven under the National Labor Relations Act on the disloyalty that discredits the service or product of a company as just cause for dismissal is inapplicable to this case cannot stand.

The Arbitrator rules out *NRLB v. Electrical Workers*, 33 LRRM 2183, quoting the landmark case of *Jefferson Standard Broadcasting Company*, 94 NLRB 1507, enf'd. 346 U.S. 464 (1953), on grounds that the statements made by Villalba referred to the whole industry. Such a conclusion is grossly erroneous. It is evident that from the second paragraph of his statement, Villalba launched his attack on Williams. It was Williams that Villalba characterized as monopolizing gaming in Puerto Rico. He petitioned the Legislature to curb Williams expansion; and, to deny it loans and subsidies. He was not referring to the entire industry then. He never identified any other employer, but his own, by name. The libelous opinion singled out one company that was not the subject of legislative investigation *per se*. The public detraction to Andrews and Williams was made in the presence of its President, causing him personal humiliation. But the harm to the good name transcended Andrews, although every accusation made to Williams was obviously directed to the person who headed it . . . Andrews. The damages caused have been argued elsewhere; and they were PROVED.

The *Jefferson* case in which the dismissal of the Union president was sustained for distributing leaflets that generated comments in the community, and that caused âpprehension in the employer and loss of income, is certainly in point. We quote: (at page 2186)

> "There is no more elemental cause for discharge of an employee than disloyalty to his employer. It is equally elemental that the Taft-Hartley Act seeks to strengthen, rather than to weaken, that cooperation, continuity of service and cordial contractual relation between employer and employee that is born of loyalty to their common enterprise.
>
> "They did not indicate that they sought to secure any benefit for themselves, as employees, by casting discredit upon the

> employer. (nor in our case as Villalba's recommendations were against the best interest of the Union membership)
> "The policies attacked were those of finance and public relations for which management, not technicians, must be responsible. . . . The handbill . . . attacked public policies of the company which had no discernible relation to the labor controversy".

In addition, we rest on several lower court cases that sustain that the actions tending to destroy the business of an employer are disloyal, illegal and cause for dismissal: *NLRB v. Knuth Brothers, Inc.*, 92 LRRM 3275 (7th Cir. 1976); *American Tel. & Tel. Co. v. NLRB*, (2d Cir. 1975).

The Judgment and Award is Contrary to Act 80 of May 30, 1976, as Amended and to the Ruling Case Law.

Under the Jefferson rationale, once it has been proven that the disloyal and improper action of an employee actually took place and harmed the business and commercial reputation of the employer, the employee's discharge is justified. This dismissal is not unreasonable, capricious, or illegal. What would not be reasonable is that an employer must keep an employee who is undermining his public trust, that promotes the destruction or limitation of his business, who publicly humiliates the President of the company charging him of events that he knows all too well are not true. It does not further the federal public policy of the bargaining process to strengthen labor-management relations, when after the bargaining of a CBA, one party undermines it publicly.

This is not a case of whistle blowing. We are not before an employee claiming a statutory right denied by his employer. Surely an employer cannot retaliate because an employee claims his due—even if the employee proves to be wrong. Here Villalba was blowing the whistle intentionally or grossly negligent to request action against him employer without asserting any violation to his statutory rights as an employee.

Before discharging Villalba, Condado Plaza took into consideration the federal and local statutory, constitutional and case law. As here cited, the Puerto Rico Dismissal Act 80, *supra*, considered justified the discharge of an employee for improper conduct {§2(a)} and for any cause if related to the interference with the sound management

and proper functioning of the employer's business. His discharge met the statutory criteria. It met the casuistry *stare decisis* prevalent in November 1985 . . . when the action was taken.

In line with the leading case of *Sec. of Labor v. I.T.T. Western Hemisphere Directories, Inc.*, 8 T.P.R. 564 (1979), which was the applicable legal precedent at the time of the dismissal . . . and still is; one isolated action, although not favored, is sufficient cause for a discharge if serious enough or where to allow its recurrence would be untenable for an employer. Condado Plaza considered Villalba's improper uncalled conduct against it serious enough not to await for a third occurrence, considering that a year before, during the labor dispute, the first occurrence had taken place . . . and forgiven. As in federal labor law, the leading case also established that an Arbitrator cannot substitute the criteria of an employer whose collective bargaining agreement grants him exclusive authority for establishing reasonable rules and for managing his business. Such is the case of Condado Plaza's CBA at bar.

Thus, federal and local law in 1985 allowed Condado Plaza to discharge Villalba for actions that harmed its business. But, the Judgment and Award on the merits did not rest on the applicable state of the law at the time of the dismissal. A Judgment that rests on a subsequent statutory amendment and which, thus, did not give due notice that the dismissal could be "unjust" is untenable under the due process notice requirements of the First Amendment.

As a legislative reaction to this dismissal, on July 3, 1986, Act 65 was approved amending Act 80 to define as unjust the discharge of an employee for ANY statements during an investigation before any administrative, judicial or legislative forum. This impulsive reaction was later moderated by Act 9 of October 3, 1986, where the legislator qualified that the statements protected in Act 65, did not include when they were defamatory or constituted a disclosure of privileged information on the company's business. Even more important, both laws provided that they would go into effect immediately *after* approved. Yet, the Arbitrator used the amendments as a yardstick throughout his award. And the Court below committed the same error. [App. (i)a, p. 5, fn. 2]

In accordance with the general principles of civil law prevalent in Puerto Rico:

> "the laws shall not have retroactive effect, if not *expressly* provided otherwise. In no case may the retroactive effect of a law, harm the vested rights under the above-mentioned legislation." 31 LPRA Sect. 3

Puerto Rico Supreme Court case law follow the same principles. The amendments to a law have *prospective* effect except when otherwise provided. *Vázquez v. Morales*, 14 TPR 1059, 1067 (1983). In *Luce and Co. v. JSM*, 62 PRR 431 (1943), a similar controversy arose, where the statute in controversy, was born as an answer to a strike conflict. The Court below then decided that the new legal protection was not available to the strikers since the law went into force after the conflict and did not expressly provide for its retroactivity. Here, the Court below erred in affirming the award.

In point is the case of *Garcia v. American Airlines*, 673 F Supp 63, 66 [DCPR 1987], in which — exactly as in our case — the dismissal occurred in November of 1985, eight months before the effective date of Act 65. The District Court for the District of Puerto Rico, however, decided:

> "Puerto Rico adheres to the general non-retroactivity of the laws. 31 LPRA Sect. 3. Only when the legislature intends retrospective application can this general rule be avoided, but such intent must be clear on the face of the statute . . . *Law 65 is clearly intended to operate prospectively* . . . We find no reason to circumvent 31 Sect. 3 policy and *thereby impose an undue burden on the defendant to confirm its action with non-existent law*. We shall *not therefore impose the non-retaliation law retrospectively. CF Dion v. Secretary of Health and Human Services*, 823 F2d 669, 671" (1st Cir 1987). (Emphasis added)

The Judgment at bar is contrary to law and federal precedent. It rests on Act 65 and law 9, imposing a burden on the employer of complying with a non-existent law. Giving retroactive effect would be unconstitutional since it would deprive the employer of his property and name without due process of law. To give retroactivity through judicial interpretation, contrary to the doctrine of separation of powers, constitutes an invalid substitution of the criteria and express intent of the legislator by the Arbitrator and by the Court below.

No judge could reasonably have reached the palpably erroneous decision made by a biased Arbitrator, who did not have the qualifications to decide substantial constitutional and statutory rights.

His blatantly erroneous award should be set aside as local law and precedent cannot override constitutional and locally applicable federal law under the present relationship of Puerto Rico and the United States of America.

Conclusion

For these reasons, this Honorable Court should note probable jurisdiction and grant our petition for certiorari.

Respectfully submitted,

Dated: July 20, 1992

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* No official translated publications available yet of cases identified with *.